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No. 09-531

IN THE

Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, *et al.*,
Petitioners,

v.

JAMES W. GREEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF INDIANA, IDAHO, MICHIGAN, NEW MEXICO, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General

*Counsel of Record

Counsel for Amici *States*

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

LAWRENCE G. WASDEN
Attorney General
State of Idaho

GREG ABBOTT
Attorney General
State of Texas

MICHAEL A. COX
Attorney General
State of Michigan

WILLIAM C. MIMS
Attorney General
State of Virginia

GARY K. KING
Attorney General
State of New Mexico

ROBERT M. MCKENNA
Attorney General
State of Washington

HENRY D. MCMASTER
Attorney General
State of South Carolina

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

QUESTIONS PRESENTED

1. Did the Tenth Circuit err by holding in conflict with *Van Orden* and recent decisions in the Ninth and Eighth Circuits, that it violated the Establishment Clause to include a monument passively acknowledging the historical significance of the Ten Commandments among other privately donated historical monuments?

2. Did the Tenth Circuit err by invoking an *uninformed and mistaken* "reasonable observer" in applying the endorsement test, in conflict with the *well-informed* "reasonable observer" employed by the Second, Sixth, Seventh, and Eighth Circuits in Establishment Clause cases?

3. Did the plaintiff, as an un-coerced "offended observer," lack Article III standing?

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Idaho, Michigan, New Mexico, South Carolina, Texas, Virginia, Washington and West Virginia, respectfully submit this brief as *amici curiae* in support of the Petitioners. As the Court is well aware, religious displays on public land dot the landscape all across the country. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 689-91 (2005); *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 906 (2005) (Scalia, J., dissenting). As the Court is also aware, offended citizens bring lawsuits challenging these displays with some frequency, so States are often called upon to defend Ten Commandments and other displays bearing religious texts, symbols and imagery. *See, e.g., Van Orden*, 545 U.S. at 685-86 n.4, n.5; *McCreary County*, 545 U.S. at 850; *ACLU v. City of Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. 2005); *ACLU v. Grayson County, Ky.*, No. 4:01CV-202-JHM, 2008 WL 859279 (W.D. Ky. Mar. 28, 2008). These lawsuits are particularly burdensome because public officials cannot reliably predict their outcomes based on precedents from this or any other court. States therefore have a compelling interest in obtaining clearer guidance for public officials and lower courts regarding the circumstances under which governments may display the Ten Commandments.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief more than 10 days prior to the due date of this brief.

The district court in this case commented that "a court needs a guide to understand how [the Establishment Clause] might impact a monolithic marble monument with engravings of the Commandments and the Mayflower Compact." App. at 80a. Unfortunately, despite this Court's decisions in *Van Orden* and *McCreary County*, the lower courts (including the courts of appeals) continue to be divided on the circumstances in which such displays are permissible and over the tests they should use to evaluate such monuments. As one judge below put it, "[o]ne might think that two such recent precedents addressing the same subject would drastically simplify a trial court's quest in deciding whether the Monument at issue here withstands constitutional scrutiny. One might be wrong." App. at 80a.

This case provides the Court with an excellent opportunity to refine and clarify the approach lower courts should take in evaluating Ten Commandments and other religious displays on public property.

SUMMARY OF THE ARGUMENT

Throughout the United States, state and local governments have incorporated into their buildings, grounds and parks various displays, monuments, statues, paintings, and other artistic expressions that have both religious and secular meaning. These displays exist as a part of an overall education of the foundations of our governments and culture. Such displays are not intended to declare official religious doctrine, nor is anyone likely to mistake them for

such. There is nothing about Ten Commandments displays, new or old, that threatens a tipping point of official religious sanction or indoctrination.

The Court should use this case as an opportunity to consider explicitly whether the "endorsement test" that emerged from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989), and that the Court referenced in *McCreary County* but not *Van Orden*, remains valid for Ten Commandments display cases. In order to provide clearer guidance for lower courts that is more in keeping with the text and history of the Establishment Clause, the court might use this case to examine whether the proper test should instead be whether a particular Ten Commandments display is religiously coercive. In the alternative, if the Court wishes to retain aspects of the endorsement test, it can use this case as a vehicle for clarifying that standard as well, such as whether the "purpose" prong of the endorsement test remains functional, and if so, whether that is the only basis (other than outright religious coercion) for holding a Ten Commandments display invalid.

Finally, even if the Court has doubts about clarifying Ten Commandments display doctrine as such, it should take the case to provide additional fact-based guidance for lower courts to consider in future cases.

ARGUMENT

I. Confusion Below Demonstrates that Ten Commandments Doctrine Needs Further Refinement

While Establishment Clause doctrine as a whole is difficult to decipher, it may be most confusing when applied to Ten Commandments displays. In *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005), the Court permitted the Texas State Capitol to display a Ten Commandments monument because it found a valid secular purpose to display a series of monuments representing the state's political and legal history. On the very same day, in *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 850-51, 881 (2005), the Court held that a display of the Ten Commandments as part of a series of monuments in a Kentucky courthouse did not have a valid secular purpose. Thus, Texas was permitted to display the Ten Commandments amongst other displays while Kentucky was not.

Applying these opinions to subsequent cases has proved to be a considerable challenge for the lower courts. Results in the wake of *McCreary County* and *Van Orden* have been anything but consistent.

1. As with *McCreary County* and *Van Orden* themselves, the secular context in which a monument with religious overtones is displayed has sometimes been found to mitigate the appearance of government religious endorsement and, at other times, to be nothing but an attempt by the government to sneak around the Establishment

Clause. In *ACLU of Ohio Foundation, Inc. v. Board of Commissioners of Lucas County, Ohio*, 444 F. Supp. 2d 805, 815 (N.D. Ohio, 2006), the court found that "[t]hough the collection appears to lack a cohesive or unitary purpose, placement of this monument among others of a secular and commemorative character weighs in favor of constitutional acceptability." *See also O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005) (upholding a statue allegedly hostile to Roman Catholicism because nearby secular displays would give a reasonable observer the sense of being in a museum rather than amidst government denigration of a particular religious faith).

In *ACLU v. Grayson County, Ky.*, No. 4:01CV-202-JHM, 2008 WL 859279, at *9 (W.D. Ky. Mar. 28 2008), however, the court discussed *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *McCreary County* (but did not mention *Van Orden*) and rejected a courthouse "Foundations of American Law and Government" display that included the Ten Commandments with other documents because "[a]n objective observer would understand that the Foundations Display's sponsor desired to post the Ten Commandments in the Courthouse for purely religious reasons."

Other cases rely more on *Van Orden* than *McCreary County*, finding that "a limited exception to the *Lemon* test exists in contexts closely analogous to that found in *Van Orden*." *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008); *see also Twombly v. City of Fargo*, 388 F.Supp.2d 983, 986-90 (D.N.D. 2005) (applying only *Van Orden*);

Russelburg v. Gibson County, Ind., No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, *2 (S.D. Ind. 2005) ("the similarities between this case and *Van Orden* are too vivid to dismiss."). Not even these courts are certain about their doctrinal footing, however: "We cannot say how narrow or broad the 'exception' may ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer." *Card*, 520 F.3d at 1018.

Meanwhile, in an en banc decision, the Eighth Circuit found a Ten Commandments monument standing *alone* to be constitutional because "[w]hile there are limits to government displays of religious messages or symbols . . . we cannot conclude that Plattsmouth's display of a Ten Commandments monument is different in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*." *ACLU v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 & n.8 (8th Cir. 2005) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test."). The dissenters, however, argued that "*Van Orden* did not extend constitutional protection to Ten Commandments displays with no secular or historical message." *Id.* at 781 (Bye, J., dissenting).

To put it mildly, there is logical tension in the notion that the Establishment Clause permits one locale, Plattsmouth, to display a Ten Commandments monument without any kind of secular context, but prohibits another, Grayson County, from doing so even in context with other

historical documents, and seems to permit others to maintain any type of monument with religious overtones—even one hostile to religion as in *Washburn*—as long as it is set amongst other randomly placed and selected statues. Yet the current state of Establishment Clause doctrine, which seems to be little more than an ad hoc test dependant upon infinite facts and circumstances, makes such results inevitable.

2. This matter showcases yet another religious display on public property causing division and uncertainty in the lower courts. The facts align with those of *Van Orden*, *see* Petition at 13-14, where the plurality explicitly found that *Lemon* and the endorsement test it spawned is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Van Orden*, 545 U.S. at 686. The plurality instead applied an "analysis [that] is driven both by the nature of the monument and by our Nation's history," in finding that "[t]he inclusion of the Ten Commandments monument in this group [of monuments representing the State's political and legal history,] has a dual significance, partaking of both religion and government." *Id.* at 686, 691-92.

Justice Breyer's concurring opinion in *Van Orden* also cast doubt on the applicability of the *Lemon* test to display cases, noting that "no exact formula can dictate a resolution to such fact-intensive cases" and that in borderline cases, there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700 (Breyer, J., concurring in the judgment).

Here, the district court undertook what it called "a nuanced fact-specific inquiry" and found that under all three potentially relevant cases—*Van Orden*, *McCreary County* and *Lemon*—the Haskell County monument was constitutional. App. at 87a, 89a, 92a, 97a. Acknowledging the similarities of this case with *Van Orden*, the court found that the monument placed by a private citizen on the grounds of the Haskell County Courthouse (along with several other privately donated monuments) did not offend the Establishment Clause. App. at 108a. In explaining the few minor differences between the two cases—namely the longevity of the Ten Commandments monuments and the thematic consistency with surrounding displays—the court found that it would be "unworkable" and "illogical" for Justice Breyer's *Van Orden* concurrence to stand for the proposition that "newer religious displays are automatically suspect" or that if there is "no grand integral design of the various monuments and displays on the lawn[,]" that a Ten Commandments monument must be unconstitutional. App. at 91a, 93a.

A Tenth Circuit panel, however, reversed, deciding that, because the Supreme Court has not explicitly overturned *Lemon*, lower courts "cannot . . . be guided in [their] analysis by the *Van Orden* plurality's disregard of the *Lemon* test." App. at 23a-24a n.8. In its *Lemon* endorsement analysis, the court found the monument to have "the impermissible principal or primary effect of endorsing religion in violation of the Establishment Clause." App. at 48a. To arrive at that conclusion, the Tenth Circuit relied on such seemingly

irrelevant facts as the size of the town where the monument sits, the artistic value of the collection of monuments on the courthouse lawn, and the speed in which someone filed a lawsuit challenging the monument. App. at 35a, 42a n.16, 44a.

An evenly divided Tenth Circuit rejected en banc rehearing, but two judges wrote vigorous dissents regarding the constitutionality of the monument. App. at 113a, 131a. Judge Kelly's dissent explains that the court's opinion improperly disregards *Van Orden* and misinterprets *Lemon*'s endorsement test because it "(1) improperly creat[es] a per se rule that new Ten Commandments displays are unconstitutional as long as someone files suit quickly; (2) . . . mak[es] the effect of the Establishment Clause depend on the size of the community; and (3) conduct[s] a subjective analysis rather than an objective analysis." App. at 116a. Judge Gorsuch argued in dissent that "the panel opinion mistakes the Supreme Court's clear message that displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion." App. at 131a. Both dissents also noted that the Tenth Circuit's analysis conflicts with the decisions of all other circuits that have considered Ten Commandments cases since *Van Orden*. App. at 129a-30a (Kelly, J., dissenting) ("this case is an outlier"); App. at 131a (Gorsuch, J., dissenting) (the opinion "mak[es] us apparently the first court of appeals since *Van Orden* to strike down an inclusive display of the Ten Commandments").

This case thus shows very clearly that the Court's Establishment Clause doctrine needs to be further refined because lower courts are unable to apply it consistently. Indeed, if lower courts do not believe they can rely on *Van Orden* for guidance, even in a case with such similar facts, it is difficult to imagine that *Van Orden* retains much precedential value at all. The Court therefore needs to weigh in yet again on the permissibility of Ten Commandments displays.

II. This Case Presents an Opportunity to Clarify the Doctrine in Useful Ways

Prior to *McCreary County* and *Van Orden*, the two-part endorsement test, which has its roots in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but found full articulation in *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989), was the main focus in Ten Commandments and other religious display cases in lower courts. *McCreary County* and *Van Orden*, however, have cast considerable doubt on the proposition that a full-blown endorsement analysis, where a court examines a display for both impermissible purposes and impermissible effects, is required in every Ten Commandments display case.

More specifically, the only rule that possibly explains the divergent holdings in *McCreary County* and *Van Orden* is the inquiry into whether the government has sponsored a Ten Commandments display with the improper purpose of endorsing religion. *McCreary County*, 545 U.S. at 862, 869

("When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."); *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate.").

One might infer from this dichotomy that there is no longer any need to inquire into whether a particular non-coercive Ten Commandments display has the "effect" of endorsing religion. *See McCreary County*, 545 U.S. at 901 (Scalia, J., dissenting) (inferring from the Court's decision that the "government action [had] a wholly secular effect"); *Van Orden*, 545 U.S. at 686 (disregarding the endorsement test completely); *see also, e.g.*, *Lucas County*, 444 F.Supp.2d at 811-12 ("In light of the Court's application of the purpose prong in *McCreary*, displays of the Decalogue, even in a courthouse, if undertaken without a religious purpose, may be constitutionally acceptable."); *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 626 (6th Cir. 2005) (finding that a collection of documents in a courthouse that were very similar those in *McCreary County* would only "be problematic [if there is] something more to signal a predominantly religious purpose.").

Not all courts have arrived at that conclusion, however. *See* App. at 48a; *see also Mercer County*, 432 F.3d at 636, 640 (applying both the purpose and effects tests); *ACLU of Ky., v. Rowan County, Ky.*,

513 F. Supp. 2d 889, 905 (E.D. Ky. 2007) (same); *Lucas County*, 444 F. Supp. 2d at 811-13 (same).

For the sake of providing clarity to courts and officials, the Court needs at the very least to say whether lower courts should still apply a full-blown two-part endorsement test, or whether, given the Court's apparent comfort with the Ten Commandments generally in *McCreary County* and *Van Orden*, inquiry into governmental purpose is sufficient. In this regard, it is worth observing that alleviating public officials and lower courts of the burden of determining whether a particular non-coercive Ten Commandments display has the "effect" of endorsing religion would eliminate some of the random fact gathering that occurs in Ten Commandments display cases, such as this one. *See* App. at 35a, 42a n.16, 44a.

That said, the purpose test itself also has substantial problems, as Indiana and other states have long argued. *See, e.g.*, Brief for State of Indiana et al. as Amici Curiae Supporting Petitioners at 17-36, *Salazar v. Buono*, No. 08-472 (U.S. June 8, 2009); Brief of State of Indiana et al. as Amici Curiae Supporting Respondents at 8-19, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500); Brief of State of Alabama et al. as Amici Curiae Supporting Petitioners at 10-11, *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693). One central problem is that, under the purpose test, substantially identical displays are often treated differently simply because an official statement or the participation of clergy at a dedication ceremony years or decades earlier are adjudged in hindsight to

have conveyed a purpose of advancing religion. *Compare Van Orden*, 545 U.S. 677 *with Books v. City of Elkhart*, 235 F.3d 292, 303-04 (7th Cir. 2000) (determining that Elkhart had accepted an Eagles monument in 1958 with an improper religious purpose because clergy had spoken at the dedication ceremony); and *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 711 (7th Cir. 2001) (disregarding the Indiana governor's stated secular purpose for a Ten Commandments monument and finding that the state had presented no valid secular justification).

Accordingly, the Court could also use this case as a vehicle for considering whether the purpose inquiry—indeed the endorsement test as a whole—is justified by the history and text of the Establishment Clause. The Court could evaluate whether, for example, a better approach would be to ask if a particular Ten Commandments display is religiously coercive. *See, e.g.*, App. at 115a n.3; *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part).

These are but a few potential avenues the Court might take to clarify Ten Commandments display doctrine. Limiting the judicial inquiry into whether a Ten Commandments display is either coercive or supported by an improper purpose would simplify matters, and in the process would likely yield far more predictable results than courts currently are able to achieve.

III. If Display Cases are Too Fact-Sensitive for a Better Test, the Court Should Still Decide More Cases, Including this One, to Provide More Guidance

There are hundreds, if not thousands, of Ten Commandments and other religious displays on public property across the United States. *See, e.g.*, *Card*, 520 F.3d at 1013. Public officials remain interested in adding more, *see, e.g.*, Samantha Sommer, *County working to fix Ten Commandments monument*, Springfield News-Sun, Nov. 13, 2009; Karen Voyles, *Dixie courthouse unveils the Ten Commandments*, The Gainesville Sun, Nov. 28, 2006.

Public-property Ten Commandments displays, new and old alike, precipitate lawsuits. Yet, as the district court noted, lawsuits challenging Ten Commandments displays are "not so much evidence of government establishing religion as . . . evidence of jurisprudence provoking litigiousness." App. at 91a. If the outcome of Establishment Clause cases were more predictable, there would be fewer lawsuits challenging the monuments—either because officials would conform the displays to the law or because offended citizens would know they cannot win in court. But as long as there is uncertainty, these cases are not going away.

Justice Breyer stated in *Van Orden* that, in Ten Commandments cases one should "rely less upon a literal application of any particular test than upon consideration of the basic purposes of the [Establishment Clause itself]." *Van Orden*, 545 U.S.

at 703-04 (Breyer, J., concurring); *see also Lynch*, 465 U.S. at 678 ("the inquiry calls for line drawing; no fixed, *per se* rule can be framed."). If indeed there can be no clearer test for Ten Commandments display cases, the Court simply needs to decide more such cases so that public officials and lower courts will have a more robust body of law to use as guidance. *Cf.* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1129 & n.32 (1996) (discussing the incremental development of the exclusionary rule through multiple factually discrete cases). This case, therefore, is cert-worthy if for no other reason than that it provides an opportunity to add to the Court's body of Ten Commandments display law.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General

Counsel for Amici *States*

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